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IN THE

Supreme Court of the United States

OCTOBER TERM, 1942.

No. 60.

C. J. HENDRY COMPANY and FRANK SEMATOVICH,
Petitioners,

vs.

E. C. MOORE, I. ZELLERBACH and A. T. JERGENS, as the Fish and Game Commission of the State of California,
Respondents.

BRIEF OF RESPONDENTS.

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Respondents.

BRIEF OF RESPONDENTS.

Statement.

The opinion of the Supreme Court of California is reported in 18 California Reports, Second Series (Cal. (2d)), page 835 (118 Pac. (2d), page 1), October 20, 1941. That court held the remedy of forfeiture of a purse seine net, provided for in Section 845 of the Fish and Game Code of California, to be a common law remedy which the common law is competent to give and therefore not an invasion of the exclusive jurisdiction over admiralty and maritime causes granted to the United States by the Federal Constitution. Certiorari was thereafter granted by this court (62 S. Ct. 1036) following a petition filed therefor.

The Question Involved.

The broad question involved in this case may be stated as follows:

Is the jurisdiction of admiralty invaded by the enforcement of a state law, enacted for the purpose of preserving fish within the territorial waters of the state, which (1) prohibits fishing by means of a net in certain areas of said waters: (2) declares a net so used a public nuisance; (3) provides that such net shall be seized, which seizure takes place on navigable waters of the state in the prohibited area; and (4) provides that a proceeding for the forfeiture of a net so used be instituted in a state court, which proceeding is, in actual practice, in the nature of an action *in rem?*

Counsel for petitioners have consistently conceded the right of the state to enact substantive legislation prohibiting the use of nets, etc., in state waters; have conceded this to be within the police power of the state and not an encroachment upon the admiralty and maritime jurisdiction of the United States, and at the same time they have consistently maintained that, regardless of the validity of its substantive features, if the proceeding to enforce it —the remedy—is "traditionally according to the course of admiralty" exclusive jurisdiction lies in admiralty; (that the seizure pursuant to state law took place on navigable waters within the borders of the state.) that this proceeding *in rem* for the forfeiture of the net is a proceeding or

remedy "traditionally according to the course of admiralty" and enforceable only in admiralty.

Concededly, it was a violation of state law (Section 842, Fish and Game Code of California), to take fish by means of a purse seine net from the waters in question. The State law directly involved in this proceeding is Section 845, Fish and Game Code, which reads as follows:

> "Any net used for taking fish in violation of the provisions of this chapter is a public nuisance. It is the duty of every person authorized to make an arrest for the violation of any provision of this code to seize and keep such net and report such seizure to the commission. The commission must commence proceedings in the superior court of the county or city and county in which the seizure is made by petitioning said court for a judgment forfeiting such net. Upon the filing of such petition, the clerk of said court shall fix a time for the hearing thereof and cause notices to be posted for fourteen days in at least three public places in the town, city, or city and county, where the court is held, setting forth the substance of such petition and the time and place fixed for its hearing. At such time the court must hear and determine said proceeding, and upon proof that such net was used in violation of this chapter must order the same forfeited. Any net so forfeited shall be sold or destroyed by the commission. The proceeds from all such sales shall be paid into the state treasury to the credit of the fish and game preservation fund."

Summary of Argument.

At the outset, we feel that we should explain what might otherwise appear to be an assumption of inconsistent positions in our argument in this brief. Under Point I of our brief we argue in accord with and support of the conclusion reached by the Supreme Court of California—that the remedy involved in the state law here under review is a common law remedy which the common law is competent to give. In so doing, we accept and proceed from the premise of that court, which is that the cause of action involved is maritime. This premise is the opposite of the one upon which our argument under Point II is based, for there we contend that the state law involved invokes a non-maritime cause of action and provides a remedy beyond the jurisdiction of admiralty to enforce. Both positions are in opposition to the points argued by petitioners in their brief, and each, we believe, furnishes a complete answer to their contentions.

From the commencement of this litigation we have contended that the cause of action was non-maritime, relying basically upon the decision of this court in *Smith v. Maryland* (1855), 59 U. S. 71. The trial court [R. 7] and the District Court of Appeal [R. 32] were of the view that that case was controlling in favor of the state court's jurisdiction. Both opinions of the Supreme Court of California [R. 36, 41] are based upon the premise that the cause was maritime. In the first opinion it was held that *Smith v. Maryland* had been "overruled by the later

decisions which are directly to the contrary." [R. 39.] In the second, the one here under review, it was held that though the state law contemplated and gave rise to a maritime cause it nevertheless afforded a common law remedy which the common law is competent to give.

Throughout we relied principally on *Smith v. Maryland*. The pro or con of the conclusion reached in the second opinion was not urged by either counsel. In our Statement Opposing Jurisdiction we took the position that *Smith v. Maryland* may have been based upon the principle advanced by the California Supreme Court in its second opinion. After much research and study we are convinced that it was not, but, as we originally contended, was decided upon the principle that the state oyster law there involved gave rise to a non-maritime cause of action and that the remedy of forfeiture of the vessel as a penalty was not of admiralty cognizance. Our argument under Point II, *infra*, is made accordingly.

I.

The Remedy Contained in Section 845, California Fish and Game Code, Is a Common Law Remedy Which the Common Law Is Competent to Give.

A. The Opinion of the Supreme Court of California.

The opinion of the California Supreme Court proceeds from the premise that the cause of action here involved is maritime. Under our Point I we accept that premise, believing that it is clearly demonstrable that, even considered as a maritime cause of action, the remedy clearly lies within the saving clause of the Judicial Code. Such was the determination of the California Supreme Court in its decision here under review.

Proceeding upon the theory that the cause of action is maritime, we now consider the principles announced in the opinion and the authorities cited in support thereof.

A-1 Effect of the "Saving Clause".

Section 256, Judicial Code (28 U. S. C. A., Sec. 371) vests exclusive jurisdiction in the courts of the United States "Of all civil causes of admiralty and maritime jurisdiction, saving to suitors in all cases the right of a common-law remedy where the common law is competent to give it . . . ." The Supreme Court of Cali-

fornia construed the general effect of the saving clause in that section[1] and then stated that

> "the fact that federal forfeiture statutes, similar to that of California, require that a proceeding thereunder against a vessel or its equipment be brought in a federal district court sitting as a court of admiralty (see *The Sarah*, 8 Wheat. 391; *U. S. v. The Betsy and Charlotte*, 4 Cranch 433; *The Confiscation Cases*, 7 Wall. 454; *U. S. v. La Vengeance*, 3 Hall (Dall.), 297; *U. S. v. Grundy*, 3 Cranch 337; *The Palmyra*, 12 Wheat. 1), does not prevent California from conferring jurisdiction upon our courts to proceed with such cases under a California statute if the type of action is a traditional common law remedy." [R. 42.]

We do not read those cases as involving Federal statutes requiring *by the provisions thereof* forfeiture proceedings against a vessel or its equipment for violation of such statutes to "be brought in a federal district court sitting as a court of admiralty." The statutes there in-

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[1] "The saving clause of the Judiciary Act makes it clear that a case involving a maritime cause of action may properly be brought in a state court if the type of remedy pursued is traditionally within the jurisdiction of the common law courts. Even though the right to sue is created by a recently enacted state statute, it is within the saving clause so long as the remedy is of a type recognized at common law. (*Red Cross Line v. Atlantic Fruit Co.*, 264 U. S. 109), including equity. (*Knapp-Stout & Co. v. McCaffrey*, 177 U. S. 638.)"

"* * * 'The saving clause of the Judiciary Act and of the Judicial Code does not contemplate admiralty remedies in the common law court. Its meaning is that in cases of concurrent jurisdiction in admiralty and at common law, the jurisdiction in the latter is not taken away.' (Benedict, Admiralty (5th Ed.) sec. 23. See *Knapp-Stout & Co. v. McCaffrey, supra; Red Cross Line v. Atlantic Fruit Co., supra.*)" [R. 42.]

volved were silent on the subject whether jurisdiction was in admiralty or elsewhere. Section 9 of the Judiciary Act of 1789 as it then existed *did* provide that the admiralty jurisdiction of the District Courts included "all seizures under laws of impost, navigation or trade of the United States, where the seizures are made, on waters which are navigable from the sea" etc. The cases involved "laws of impost, navigation or trade of the United States", and under the terms of the Judiciary Act no court other than a court of admiralty had jurisdiction, but it was not because the particular statute involved in those cases *so provided*. It was because of an act of Congress conferring general jurisdiction in all such cases on the District Court. However, as stated in *The Eagle* (1868), 75 U. S. 15, 26, such a statute was "useless and of no effect", because forfeiture proceedings against a vessel and its equipment following seizure on navigable waters for violation of a *Federal* statute authorizing seizure and forfeiture were within the exclusive jurisdiction of admiralty by force of the general constitutional grant of admiralty jurisdiction alone. When the Revised Statutes were enacted in 1872 the portion of Section 9 of the Judiciary Act of 1789 above referred to was omitted. (Revised Statutes, Sec. 711.)[18] But admiralty has nevertheless continued to exercise jurisdiction of all forfeitures of vessels, etc., following seizure on navigable waters for violation of *Federal* law when the law in question permitted seizure and forfeiture as a penalty for violation.

Even so, it is true that the mere fact that admiralty has such jurisdiction, where a *Federal* law is involved,

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[18]See footnote (40), p. 52, *infra*, and see text, p. 52, *infra*.

does not prevent the State "from conferring jurisdiction upon her courts to proceed with" [R. 42] forfeitures of a vessel or its equipment following seizure for violation of State law. We so argue under Point II of this brief. The California Supreme Court, however, holds that a state is not prevented from conferring such jurisdiction "if the type of action is a traditional common law remedy." Without reference to the position taken under our Point II and proceeding upon the theory that the cause of action is maritime, we examine the remedy under the State law here to ascertain whether it "is a traditional common law remedy."

A-2 Forfeiture of a Vessel as a Penalty for Violation of a Statute Was a Remedy Known to the Common Law.

The Supreme Court of California then stated that the common law of California included not only the *lex non scripta* but as well the written statutes of Parliament enacted prior to the American Revolution.[2]

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[2] "In 1789 when the Judiciary Act was enacted there had been little development of the common law in federal or state courts of the United States. An examination of the English common law as it existed before that time must therefore be made.

"In determining the jurisdiction of the English common law courts, acts of Parliament defining that jurisdiction must be taken into account. It is well established in California that the common law of England includes not only the *lex non scripta* but also the written statutes enacted by Parliament. (*Martin v. Superior Court*, 176 Cal. 289; *People v. Richardson*, 138 Cal. App. 404.). Other jurisdictions are in accord with this view, most of them holding that English statutes enacted prior to the time of separation of the colonies from the mother country in 1776 are included within the English common law. (See cases cited in 78 U. of Pa. L. Rev. 195; 11 Am. Jur. 166; 22 L. R. A. 508, *et seq.*)" [R. 43.]

We do not doubt that in the last analysis the question whether a remedy is a common law remedy, which the common law is competent to give and therefore within the purview of the saving clause, is to be determined by the Federal courts. Nor do we doubt that this Court will agree with the portion of the opinion of the California Supreme Court quoted in footnote (*2*), page 9, *supra*. The question, nevertheless, in any such case would seem to be whether, assuming the remedy to be a common law remedy, its enforcement would do violence to the uniformity and harmony of the maritime law which it was the purpose of the constitutional grant to preserve. (See Vol. 1, *Benedict on Admiralty*, (6th Ed.), p. 12, sec. 9, *et seq.*) For it is now settled that maritime rights are to be determined according to maritime law, not only when the parties seek a maritime remedy in a court of admiralty, but as well when they seek a common law remedy under the saving clause. (*Chelentis v. Luckenbach S. S. Co.*, 247 U. S. 372, 38 S. Ct. 501.) As we argue more fully later in this brief, the remedy here pertains to a local problem entirely, one local to each state, it does not interfere with the harmony and uniformity of the maritime law and it should be permitted to the states to enforce it in their own tribunals.

The Supreme Court of California then referred to an English statute of 1660 as conferring a remedy, such

as we are here concerned with, to the common law courts.[3]

Two cases are then cited by the California Supreme Court construing that statute. One is *Roberts v. Withered* (1696), 5 Mod. 192, 87 Eng. Rep. 602; 12 Mod. 92, 88 Eng Rep. 1186, and the other is *Wilkins v. Despard*, 5 Durnf. & East's Rep. 112, 5 Term Rep. 112, 101 Eng. Rep. 65.

In the first case, *Roberts v. Withered*, an action of detinue was brought "for goods forfeited by virtue of the statute" referred to in the opinion of the Supreme Court

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[3] "While it is true that actions in common law courts are usually in *personam* as contrasted to the *in rem* proceedings of the courts of the admiralty, it has long been established that an action *in rem* can be brought by the state in an ordinary common law court for the forfeiture of goods or articles used in violation of laws imposing such a penalty even though the articles thus proceeded against are ships, appurtenances thereof, or cargoes. The statute of 12 Car. II, c. 18 (7 English Statutes at Large) enacted in 1660 provided that all imports to and exports from England and its possessions must be in English ships 'under the penalty of the *forfeiture and loss of all the goods and commodities* which shall be imported into or exported out of any the foresaid places in any other ship or vessel, *as also of the ship or vessel, with all its guns, furniture, tackle, ammunition and apparel*; one third part thereof to his Majesty, his heirs and successors; one third part to the governor of such land, plantation, island or territory where such default shall be committed, in case the said ship or goods be there seized, or otherwise that third part also to his Majesty, his heirs and successors; and the other third part to him or them who shall seize, inform or *sue for the same in any court of record*, by bill, information, plaint or other action, where no essoin, protection or wager of law shall be allowed; . . . (Italics added.) This statute, providing for the institution of forfeiture proceedings in any court of record against ships and cargoes used in violation of the act clearly authorized a remedy by forfeiture in the common law courts." [R. 43, 44.]

of California. *Non detinet* was pleaded. Motion in arrest of judgment was made upon the following grounds:

> "that an action of *detinue* will not lie except where the defendant comes by the goods either by *delivering* or by *finding*, and where the plaintiff has an *antecedent right*, neither of which is this case; and it is not enough to say, that the statute vests a property in him who first sues for the forfeiture, because, by the express words thereof, the right is not attached but by seizure or information. Most of the statutes which give penalties of forfeiture direct how they shall be recovered, *scilicet*, 'by action of *debt*, bill, plaint, &c.', but where a law gives a property 'by information or seizure' of the goods, an action of *detinue* will not lie till that be done, because it cannot be a wrongful detainer of that to which the party had no right."

Opposing the motion for arrest of judgment, plaintiff contended that an action of detinue would lie for the following reasons:

> ". . . for as the act had given only the penalty of one hundred pounds, one moiety to the King, the other to him who shall sue for the same, and had not said in what action, it will not be denied but that *debt* would have been the proper action in such case for the informer to recover his moiety. There was no difference between *debt* and *detinue* for such a forfeiture; for the informer had an antecedent property in neither. But in this case there is a forfeiture immediately vested in the King and party, and if

one may have an action, the other may also sue for his moiety. Now it is no argument to say, because some persons have chose to proceed by way of *information* upon forfeitures on penal statutes, therefore an action of *detinue* will not lie for such a forfeiture."

The holding of the court was as follows:

"To prove that a forfeiture was *vested*, this case was compared by the court to *a replevin*, which supposes an antecedent property, as much as an action of *detinue*; for it is a rule, that the plaintiff must have the property of the goods in him at the time when they were taken; but yet the lord shall have a *replevin* of the cattle of his *villein* being distrained, though he had no property in them at the time of the distress made: for my *Lord Coke* (b) was of opinion, that the bringing *a replevin* is a claim in law, and that the property is vested thereby in the plaintiff. So by navigating contrary to the Act, the property is divested out of the former owner; and by this action now brought, it is vested in the plaintiff, and therefore he may bring *detinue* for it."

The same case was later considered in *Robert qui tam Witherhead* (12 Mod. 92; 88 English Rep. 1186). The question again was whether detinue would lie under the statute in question. Judgment went for the plaintiff and the court expressed itself as follows:

"Holt, Chief Justice. The design of this Act was to make an immediate alteration of the property of the goods; the one moiety to the King, the other to him who would inform and sue for the same. If he

had seized the goods, or any part in the name of the whole, no one will doubt but *detinue* would have laid. At common law, a villein had absolute property, and the lord had it not till seizure made. If a villein before such seizure had aliened, the lord could not touch them; but if they were distrained before seizure, the lord could replevy them (a): and yet a replevin supposes an antecedent right as much as a detinue; and the reason is, because the bringing a replevin amounts to a claim and seizure, an *eo instante* vests the property in the lord. In debt upon a bond, where the contract is to pay the money on request, the party brings his action without any request, yet the bringing the action is one; so here, the bringing a detinue amounts to a seizure.

"Rokeby, Justice. The property is devested out of the owner by importation, but not vested in him that sues until bringing the action or seizure (b)."

Then in *Wilkins, et al. v. Despard,* 5 Term Rep. 112 (101 Eng. Rep. 65), it was held that under the same navigation act if a ship was seized and forfeited by a Governor in a foreign country belonging to Great Britain the owner could not maintain trespass against the party who seized the ship although he did not proceed to condemnation, for the property was divested out of the owner by the forfeiture.

Section 4468 of the Political Code of California, enacted in 1872, provides that:

"The common law of England, so far as it is not repugnant to or inconsistent with the constitution of the United States, or the constitution or laws of this state, is the rule of decision in all the courts of this state."

In *Martin v. Superior Court* (1917), 176 Cal. 289, 168 Pac. 135, that section was construed to include the "whole body of that jurisprudence as it stood, influenced by statute, at the time when the code section was adopted." (p. 293.) That, then, is the common law of California. There is no national common law in the United States distinct from the common law which each state has adopted for itself. (*Kansas v. Colorado* (1906), 206 U. S. 46, 96, 27 S. Ct. 655; *Western Union Telegraph Co. v. Call Publishing Co.* (1900), 181 U. S. 92, 101, 102, 21 S. Ct. 561.) As to the Federal Constitution, many of its provisions are framed in the language of the common law, as it was brought to this country by the early settlers, and the Constitution must, therefore, be read and interpreted in the light of the common law principles of history familiarly known to its framers. (*Kansas v. Colorado, supra.*)

Petitioners say that (Br. p. 10):

> "The existence of a statutory remedy in the laws of England prior to the separation of the American colonies does not mean that the statute was exclusively, or at all, of common law cognizance."

And that (Br. p. 32):

> "The constitutions or the legislatures of many states have provided, and the courts have held that the rule of decision in matters not covered by local statute, shall be the common law of England, and that, it frequently has been held, includes certain Acts of Parliament which deal with subjects of the common law, substantive and remedial."

Then the argument continues that forfeitures *in rem* were cognizable only on the revenue side of the Exchequer.[4]

The judges of the Exchequer were "Barons."[5] If we are correct that *Roberts v Withered, Robert qui tam v. Witherhead* and *Wilkins v. Despard,*[6] recognized a pro-

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[4]On the revenue side of the Exchequer the "Crown sued subject in respect of royal revenue." "Memoranda Rolls" were the first legal entries recorded and had to do with revenue cases in which the King sued the subject. As early, however, as 1236, a separate series of records were kept known as "Exchequer of Pleas plea rolls." (Vol. 177, The Law Times (1937), article, "The Court of Exchequer in Legal History".) It is there further stated (pp. 405, 406): "Thus by the fourteenth century the line of demarcation between memoranda and plea roll cases seems to have been drawn so that on the memoranda roll were recorded cases of King v. Subject; while the plea roll entered cases of Subject v. Subject. This differentiation may have corresponded to the sessions at which the respective types of cases were heard. Probably the memoranda roll pleas were dealt with at the audit sessions, while the plea roll cases were heard at separate sessions for pleas. . . . The jurisdiction of the Exchequer extended, as we have seen, over revenue cases in which the Crown sued subject in respect of royal revenue; and over common pleas property cognizable in the Exchequer because they concerned either the King's revenue or Exchequer officials. . . . Of the revenue cases there is little to say; their nature and limits are sufficiently obvious, and they do not present many obscure features. The common law cases need more comment. A plaintiff was entitled to sue in a case as touching the King's revenue if he was being pressed by the Crown for payment of a sum, contribution towards which was due him from another person. . . . In addition there are a few exceptional cases, such as those dealing with the affairs of merchants, a case on treasure trove and another concerning the damages caused by infringement of liberty. . . . In the sixteenth century the common law jurisdiction of the Exchequer was extended almost indefinitely by the fictional use of the writ *quominus*. This writ embodies the principle of the defendant's being liable to the plaintiff in part payment of debts owned by the latter to the King." (Vol. 177, The Law Times (1937), "The Court of Exchequer in Legal History," pp. 405, 406.)

[5]Bouvier's Law Dictionary.

[6]5 Mod. 192, 87 Eng. Rep. 602; 12 Mod. 92, 88 Eng. Rep. 1186; 5 Term Rep. 112, 101 Eng. Rep. 65.

ceeding essentially *in rem* for forfeiture under Statute 12 Car. II, c. 18, certainly the remedy was not administered in those cases in the Exchequer. It was entirely in a common law court, presided over by judges of a common law court; nor were any of the characteristics of a proceeding on the revenue side of the Exchequer present.

It would appear then that our next question to be solved is whether the Statute 12 Car. II, c. 18 was enacted "in aid of the common law";[7] in amendment of it. If it was, then it became part of the common law of California.[8]

Forfeitures were long known to the common law. Some were extremely harsh in their application.[9] The Statute 12 Car. II, c. 18 simply added a ground of forfeiture and prescribed how it should be effected. Thus it was merely amendatory of that which in substance had long been known at common law.

Petitioners misconceive entirely the mechanics whereby the forfeiture under 12 Car. II, c. 18 was effected. They state that it took place "by operation of law upon bare use of the property in the interdicted act." (Br. p. 34.)

On the contrary the common law doctrine of "relation back" (*Willett v. Jordan* (1934), 1 Cal. (2d) 461, 35 Pac.

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[7]*Martin v. Superior Court* (1917), 176 Cal. 289, 168 Pac. 135.

[8]*Scott v. Lunt* (1833), 32 U. S. 594, 604.

[9]The ancient common law doctrine of deodand recognized a forfeiture of personalty which had caused the death of a human being without the prerequisite of a trial or conviction of any person as a guilty participant in the injury which caused death. (See, 23 Am. Jur. p. 601, sec. 4, "Forfeitures and Penalties".) Also, there was the doctrine of attainder.

(2d) 1025), vested title upon judgment of condemnation and not before.[10]

It is also said that though the proceedings in *Roberts v. Withered*, *Robert qui tam v. Witherhead*, and *Wilkins v. Despard*[11] involved a common law remedy yet they are no authority for the proposition that the remedy contained in the state law here is a common law remedy, because those cases involved actions *in personam* and not actions *in rem*; that the former have always been known at common law whereas the latter are unknown to it; that proceedings *in rem* for forfeiture were cognizable only on the revenue side of the Exchequer, citing *The Palmyra* (1827), 25 U. S. 1, 14, 12 Wheat., where Mr. Justice Story said that the common law doctrine of forfeiture upon conviction of crime was never "applied to seizures and forfeitures created by statute, *in rem*, cognizable on the revenue side of the exchequer."

From that it is argued that proceedings *in rem* for forfeiture were cognizable *only* in the Exchequer on the revenue side. That conclusion does not follow. The revenue side of the Exchequer concerned itself *only* with suits

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[10]In *United States v. Grundy* (1806), 7 U. S. 337, 350, 3 Cranch., *Roberts v. Withered* and *Wilkins v. Despard* are carefully considered. There it is recognized that three types of forfeiture existed: (1) upon conviction at common law; (2) upon judgment of condemnation, the forfeiture relating back to the time of commission of the act; and (3) forfeiture in the alternative—forfeiture of the thing or its value—in which case there was no forfeiture until election made to so proceed. The forfeiture under 12 Car. II. c. 18 was of the second class. See, also, *The Palmyra* (1827), 25 U. S. 1, 14; 12 Wheat.

[11]5 Mod. 192, 87 Eng. Rep. 602; 12 Mod. 92, 88 Eng. Rep. 1186; 5 Term Rep. 112, 101 Eng. Rep. 65.

by the King against a subject.[12] The Statute 12 Car. II, c. 18 conferred jurisdiction for forfeiture thereunder upon common law courts[13] and the proceedings for forfeiture were there conducted as in *Roberts v. Withered*, *Robert qui tam v. Witherhead*, and *Wilkins v. Despard*.[14]

That was a statute, as we have said, amendatory of the common law. As stated in *Robert qui tam v. Witherhead*, *supra*, "the bringing a detinue amounts to a seizure." In all essentials the proceeding, though in detinue, was one *in rem*. In order to sustain the right to forfeiture it was necessary that there be a seizure and the court so held, but construed the bringing of the action as a seizure. This certainly was unnecessary to the maintenance of the action of detinue, for in such action, as distinguished from replevin, the plaintiff was always compelled to wait until the action was determined before he could have possession. Furthermore, the action was a detinue in name only, for though in detinue the judgment was conditional for the goods or their value and damages for their detention, thus leaving the defendant his choice of delivering up the goods or their value (2 Pollock and Maitland History of English Law, pp. 173, 174), the Statute of 12 Car. II, c. 18 left the defendant no alternative.

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[12]Vol. 177, The Law Times (1937), "The Court of Exchequer in Legal History," pp. 405, 406.

[13]In *Gelston v. Hoyt* (1818), 16 U. S. 245, 312 (3 Wheat.) Mr. Justice Story said, construing *Roberts v. Witherhead* (12 Mod. 92) and *Wilkins v. Despard* (5 T. R. 112) with reference to the Statute 12 Car. II, c. 8: "So that it is apparent, that in respect to forfeitures under this statute, the exchequer had not an exclusive jurisdiction, but that the other courts of common law had at least a concurrent jurisdiction."

[14]5 Mod. 192, 87 Eng. Rep. 602; 12 Mod. 92, 88 Eng. Rep. 1186; 5 Term Rep. 112, 101 Eng. Rep. 65.

Petitioners continually urge also that forfeitures *in rem* were unknown to the common law and were derived from the civil law. Regardless of their origin it is clear that, at least so far as the Statute 12 Car. II, c. 18 was concerned, such forfeitures under certain circumstances were made cognizable in a common law court and enforceable by a common law remedy.[15]

It is argued that proceedings *in rem* could not be available in a common law court because a decree *in rem* binds all the world and such a proceeding was unknown to the common law—a decree running against those not before the court. A decree *in rem* in admiralty does bind all the world, but it by no means follows that every decree *in rem* in every other court must do likewise. For instance, a state lien law for non-maritime transactions[16] and a state fishing law,[17] both of which contemplate proceedings *in rem* against a vessel bind all *except* maritime lien holders. "A proceeding *in rem* as used in the admiralty courts is not a remedy afforded by the common law; it is a proceeding under the civil law."[18] And so it is, but, as we have said, such a proceeding binds all the world whereas a proceeding *in rem* for forfeiture under the state fishing law here involved does not and could not purport to do so,[19] and in fact is not a true proceeding *in rem*.

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[15]In 13 and 14 Car. II, c. 11 (8 Eng. Stats. at Large) the forfeiture in common law courts of vessels is provided for in case of certain violations of law.

[16]*The Winnebago* (1906), 205 U. S. 354, 27 S. Ct. 509.

[17]*The Elexena* (D. C. Va. 1892), 53 Fed. 359, 362.

[18]*The Moses Taylor* (1866), 71 U. S. 411.

[19]*The Elexena* (D. C. Va., 1892), 53 Fed. 359, 362; and *The Winnebago* (1906), 205 U. S. 354, 27 S. Ct. 509.

A true proceeding *in rem* whether in admiralty or otherwise is binding on everyone.[20]

In a proceeding *in rem* in admiralty the vessel is considered as a sentient being capable of contracting and capable of committing torts. The maritime lien which is the foundation of such a proceeding arises out of a fictional hypothecation of the vessel for its contracts, torts, etc. The characteristics of maritime commerce have necessitated such a practice. Not so, however, with the proceeding *in rem* under the state law here. That proceeding does not arise out of *any* lien, nor has it anything to do with any of the characteristics on which such a lien is founded. The net here is no more considered a sentient being within the contemplation of an *in rem* proceeding in admiralty than is anything else forfeited as a penalty consequent to the commission of an unlawful act. It is simply seized because its possessor has used it in violation of law, and forfeited as a penalty upon him who so used it. If others have superior rights or maritime liens they are in no wise affected by the decree of forfeiture.[21]

It cannot be said, as petitioners contend, that a decision by this Court that the state law here affords a common law remedy will permit any state to create a right *in rem* as a remedy for any cause of a maritime nature it may create. The only proceeding *in rem* denied the states to enforce is that which is founded on the maritime lien.[22]

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[20]*Crall v. Poso Irr. Dist.* (1890), 87 Cal. 140, 148, 26 Pac. 797; *Cunningham v. Shanklin* (1882), 60 Cal. 118, 124; *State v. McGlynn* (1862), 20 Cal. 233, 270.

[21]*The Winnebago* (1906), 205 U. S. 354, 27 S. Ct. 509.

[22]*The Rock Island Bridge* (1867), 73 U. S. 213, 215; *The Resolute* (1897), 168 U. S. 437, 440, 18 S. Ct. 112, holding that the foundation of the proceeding *in rem* in admiralty is the maritime lien.

It is only "proceedings *in rem* according to the course of admiralty" which are denied them,[23] and no such proceeding exists in the absence of a maritime lien. Of course, other subjects of admiralty jurisdiction, not based on a maritime lien but on Federal forfeiture statutes for violation of Federal law, are wholly beyond the scope of state jurisdiction.

Never has it been considered in this country that a proceeding to abate a net as a nuisance—forfeit a net—because of violation of a state fishing law, was a "proceeding *in rem* according to the course of admiralty." In this connection it is most significant that this Court when promulgating the Admiralty Rules did not so consider it. In Rule 21, the requisites of a libel of information upon seizures of vessels in navigable waters and on the high seas are stated.[24] The rule has to do entirely with violations of Federal law. A libel for the forfeiture of a vessel

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[23] *Southern Pacific Co. v. Jensen* (1916), 244 U. S. 205, 216, 37 S. Ct. 524.

[24] "All informations and libels of information upon seizures for any breach of the revenue, or navigation or other laws of the United States, shall state the place of seizure, whether it be on land or on the high seas, or on navigable waters within the admiralty and maritime jurisdiction of the United States, and the district within which the property is brought and where it then is. The information or libel of information shall also propound in distinct articles the matters relied on as grounds or causes of forfeiture, and aver the same to be contrary to the form of the statute or statutes of the United States in such case provided, as the case may require, and shall conclude with a prayer of due process to enforce the forfeiture, and to give notice to all persons concerned in interest to appear and show cause at the return-day of the process why the forfeiture should not be decreed."

or its equipment for violation of a state fishing law could not possibly be drafted if that rule were to be observed and complied with. We may then safely say that, given a subject matter over which the state has exclusive jurisdiction, at least in the absence of an act of Congress or treaty, such as state fisheries,[25] the state may, in the absence of other constitutional or legislative restrictions, provide a remedy of seizure and forfeiture by a proceeding in the nature of an action *in rem*, even though the seizure be made on navigable waters within the borders of the state. The various states have acted in this respect upon the assumption that they had the right so to do since the founding of this government, and no one has before suggested that by doing so the uniformity or harmony of the maritime law has in the leastwise been impaired, or that proceedings of the kind here involved were "proceedings *in rem* according to the course of admiralty." At this late date such a claim flies directly in the face of a national usage and practice, which for over a hundred years has disclosed no impairment to the uniformity of the maritime law.

What has been said should dispose of all adverse contentions. One further observation, however. The Supreme Court of California stated that the remedy denied the

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[25]See *Missouri v. Holland* (1920), 252 U. S. 416, 40 S. Ct. 382, upholding Act of 1918 giving effect to Migratory Bird Treaty of 1916. See, also, *United States v. Shauver* (1916), 214 Fed. 154, and *United States v. McCullagh* (1915), 221 Fed. 288, both denying right of Congress, prior to adoption of treaty, to regulate killing of migratory birds within the borders of the states.

states by *The Moses Taylor*[26] was a type of *in rem* proceeding foreign to the common law.[27]

It is quite true that the cases cited in the last footnote "were concerned with types of *in rem* proceedings that were foreign to the common law." They were concerned with proceedings *in rem* arising out of the breach of a *maritime contract* or the commission of a *maritime tort*, and never did the common law courts assume jurisdiction of proceedings *in rem* based upon such transactions. As we have said, proceedings *in rem* based upon breach of maritime contract or commission of a maritime tort have always been considered proceedings "*in rem* according to the course of admiralty," for admiralty has always assumed jurisdiction thereover. On the other hand, a proceeding to forfeit a vessel or its equipment as provided for in the statute and as a penalty for the violation of such statute falls within an entirely different category than the *in rem* proceeding involved in *The Moses Taylor* and the other cases cited by the Supreme Court of California. One has its foundation in the maritime lien; the other has not.

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[26]71 U. S. 411 (1866).

[27]"There are cases which state that an *in rem* action against a vessel is not a common law remedy and is therefore within the exclusive admiralty jurisdiction of the federal courts. (*The Moses Taylor, supra; The Ad. Hine v. Trevor*, 4 Wall. 555; *The Glide*, 167 U. S. 606; *The Belfast*, 7 Wall. 624.) These cases, however, were concerned with types of *in rem* proceedings that were foreign to the common law. They are authority for the rule that a state court can have no jurisdiction over an action *in rem* against a vessel when such action has no counterpart in the common law courts." [R. 45.]

If admiralty were to attempt to exercise jurisdiction in all cases such as this one the result might very readily produce a highly confused and even chaotic situation. A large majority of our states either contain or border upon navigable waters. Each has its own local conditions and problems—peculiar to itself. This has heretofore been recognized, and no effort has been made by the Congress or through judicial construction to treat of or provide for such localized control. We submit that the reason for this is that our maritime law, which strives for uniformity and harmony in its application, has wisely forsworn any attempt to impose generalized rules upon local or provincial situations and needs.

Therefore, we say that the grounds upon which it has been held that proceedings *in rem* against vessels are of admiralty jurisdiction—such as those for breach of maritime contracts, the commission of maritime torts or for forfeiture upon a violation of Federal statutes prescribing forfeitures as a penalty—are entirely lacking in this case and, that, in accepting the theory adopted by the Supreme Court of the State of California, viz., that the cause involved here is a maritime cause of action, it must be concluded, upon both principle and authority, that the remedy afforded by the statute is a common law remedy which the common law is competent to give, and hence within the saving clause of the Judicial Code.

II.

Section 845, California Fish and Game Code, Invokes a Non-maritime Cause of Action and Provides a Remedy Not Cognizable in Admiralty.

As we have said, the basic authority for our position under this point is *Smith v. Maryland* (1855), 59 U. S. 71. Petitioners counter that this case has been overruled, commencing with the decision in *The Moses Taylor* (1866), 71 U. S. 411. We shall first refer to the *Smith* case and then, for the purpose of demonstrating the entire dissimilarity in the principles upon which it and the cases claimed to have overruled it in some respect were based, engage in the analysis indicated in the index of this brief, which, when carried to its logical conclusion, completely refutes petitioners' claim.

A. Smith v. Maryland Decided by This Court in 1855 is Controlling.

In *Smith v. Maryland, supra,* a statute of the State of Maryland, enacted to prevent the destruction of oysters in the waters of the State, provided in part (p. 73):

> " 'That it shall be unlawful to take or catch oysters in any of the waters of this State with a scoop or drag, or any other instrument than such tongs and rakes as are now in use, and authorized by law; and all persons whatever are hereby forbid the use of such instruments in taking or catching oysters in the waters of this State, on pain of forfeiting to the State the boat or vessel employed for the purpose, together with her papers, furniture, tackle, and apparel, and all things on board the same.' "

The plaintiff in error in the case was a citizen of the State of Pennsylvania and the owner of a sloop called

"The Volant", regularly enrolled at the port of Philadelphia and licensed to be employed in the coast trade and fisheries. She was seized by the sheriff of a county of Maryland while engaged in dredging for oysters in Chesapeake Bay and was condemned to be forfeited to the state of Maryland. On appeal to the Circuit Court for the county, that being the highest court in which a decision could be had, the decree of forfeiture was affirmed. The plaintiff in error insisted that the seizure and condemnation were repugnant to the United States Constitution. The court held that the enrollment and license above referred to conferred no immunity from the operation of valid laws of a state, "But a State may make valid laws for the seizure of vessels of the United States. Such, among others, are quarantine and health laws." (p. 74); that the soil below low-water mark was the subject of exclusive propriety and ownership in the State and held by the State "not only subject to, but in some sense in trust for, the enjoyment of certain public rights, among which is the common liberty of taking fish, as well shellfish as floating fish." (p. 74.) The court further continued on page 75:

> "The State holds the propriety of this soil for the conservation of the public rights of fishery thereon, and may regulate the modes of that enjoyment so as to prevent the destruction of the fishery. In other words, it may forbid all such acts as would render the public right less valuable, or destroy it altogether. This power results from the ownership of the soil, from the legislative jurisdiction of the State over it, and from its duty to preserve unimpaired those public uses for which the soil is held."

The court then held that the Maryland law was of that character; its purpose being to prevent the destruction of oysters within the waters of the State, by the use of particular instruments in taking them. Then, with reference to the portion of the Maryland law quoted *supra*, the court said on page 75:

> "So much of this law as is above cited may be correctly said to be not in conflict with, but in furtherance of, any and all public rights of taking oysters, whatever they may be; and it is the judgment of the court, that it is within the legislative power of the State to interrupt the voyage and inflict the forfeiture of a vessel enrolled and licensed under the laws of the United States, for a disobedience, by those on board, of the commands of such a law. To inflict a forfeiture of a vessel on account of the misconduct of those on board,—treating the thing as liable to forfeiture, because the instrument of the offense is within established principles of legislation, which have been applied by most civilized governments."

In the quotation last set forth the court was referring to the alleged conflict between the Maryland law and the commerce clause. With reference to the grant of admiralty and maritime jurisdiction the court said on page 76:

> "It was also suggested, that it is repugnant to the second section of the third article, which declares that the judicial power of the United States shall extend to all cases of admiralty and maritime jurisdiction. But we consider it to have been settled by this court, in United States v. Bevans, 3 Wheat. 386, that this clause in the constitution did not affect the jurisdiction, nor the legislative power of the States, over so much of their territory as lies below high-water mark,

save that they parted with the power so to legislate as to conflict with the admiralty jurisdiction or laws of the United States. As this law conflicts neither with the admiralty jurisdiction of any court of the United States conferred by congress, nor with any law of congress whatever, we are of opinion it is not repugnant to this clause of the constitution."

Smith v. Maryland is direct authority for the correctness of our position under this point. The court there laid down the rule in effect that such regulation by the State as is attempted by Section 845 of the California Fish and Game Code is no part of the general maritime law accepted and received in this country as interpreted by judicial decision (*The Lottawanna, infra*); that it has never been included within it by act of Congress nor is the remedy of seizure and forfeiture for violation of such a law within the jurisdiction of admiralty. Other cases recognize the same rule and follow *Smith v. Maryland.*[28]

In the early case of *Corfield v. Coryell* (C. C. Pa. 1823), Federal Cases 3230, an action for trespass was brought for the seizing of a certain vessel named "The Hiram." The vessel while in possession of one who had rented it from the plaintiff was seen raking and collecting

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[28] *McCready v. Virginia* (Va. 1876), 94 U. S. 391, 395; *The Ann* (D. C. Md. 1881), 8 Fed. 923, 926, 928; *Dize v. Lloyd* (C. C. Md. 1888), 36 Fed. 651, 652; *Manchester v. Massachusetts* (1891), 139 U. S. 240, 254, 259, 260, 261, 262, 263, 264, 11 S. Ct. 559; *The Elexena* (D. C. Va. 1892), 53 Fed. 359, 366; *Shively v. Bowlby* (1893), 152 U. S. 1, 24, 49, 14 S. Ct. 548; *Lawton v. Steele* (1894), 152 U. S. 133, 138, 139, 14 S. Ct. 499; *The City of Norwalk* (D. C. N. Y. 1893), 55 Fed. 98, 106; *The Abby Dodge* (1911), 223 U. S. 166, 174, 32 S. Ct. 310; *Mirkovich v. Milnor* (D. C. Cal. 1940), 34 Fed. Supp. 409.

oysters in New Jersey waters with a dredge. She was boarded by the defendant who acted as a prize master and took her into port and put her under guard. A hearing was thereafter had and the vessel, with her tackle, appurtenances and furniture, was condemned and ordered to be sold. The defendant justified under an act of New Jersey forbidding raking and collecting of oysters in New Jersey waters at that time of the year. The act provided that for collecting oysters during the prohibited period the vessel, tackle, appurtenances and furniture should be forfeited. The opinion was written by Mr. Justice Washington sitting in that case as a circuit justice, but who at the same time was actually a justice of this Honorable Court. On page 552, Mr. Justice Washington stated as follows:

> "It is lastly objected that this act violates that part of the Constitution which extends the judicial power of the United States to all cases of admiralty and maritime jurisdiction . . . . , but it is by no means to be conceded that, because offenses of the nature we are now considering may rightfully belong to the jurisdiction of the English admiralty, the power of that government to regulate fisheries being unquestionable, Congress has a like power to declare similar acts or any act at all done by individuals in relation to the fisheries within the limits of the respective states, offenses against the United States. . . . But we hold that the power to regulate the fisheries belonging to the several states, and to punish those who would transgress those regulations, was exclusively vested in the states, respectively, at the time the present Constitution was adopted, and that it was not surrendered to the United States by the mere grant of admiralty and maritime jurisdiction to the judicial branch of the government.
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> "* * * * * * * * *

". . . If then it could be admitted that Congress might legislate upon the subject of fisheries within the limits of the several states, upon the ground of the admiralty and maritime jurisdiction, it would seem to be a conclusive answer to the whole of the argument on this point, that no such legislation has taken place; and consequently the power of the state government to pass laws to regulate fisheries within their respective limits remains as it stood before the Constitution was adopted."

Petitioners say (Br. p. 15) that "if it were a material factor we could present a convincing argument to the effect that the entire subject of the regulation of fishing in navigable waters is inherently maritime in character, and causes involving fishing regulations are of admiralty cognizance, in principle and historically." Then it is said that such a discussion "has no place in this case," for the "gravamen of the cause of action is not the *offense* but the *seizure*." On the contrary, that which petitioners choose to ignore is the necessary starting point to determine the whole question of jurisdiction, viz.: 1. The control of State fisheries has never been accepted as part of our maritime law;[28a] 2. Violation of a state fishing law gives rise to a non-maritime cause of action;[28b] 3. Non-maritime causes of action are not enforceable in admiralty.[28c] Furthermore, the enforcement of state fishing laws has never been accepted as part of the jurisdiction of ad-

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[28a] See cases, footnote 28, page 29, *supra*, and footnote 39, page 49, *infra*.

[28b] See Cases, footnote 28, page 29, *supra*; *Corfield v. Coryell*, *supra*, page 29 *et seq.*, and cases, footnote 39, page 49, *infra*.

[28c] See cases, footnote 41, page 53, *infra*.

miralty. The principles that we have just stated are more fully developed further on in this brief.

Petitioners insist repeatedly that if this proceeding be held to be within the jurisdiction of the state court to enforce "it will destroy the uniformity and harmony of admiralty procedure and ultimately lead to the upsetting of the entire admiralty jurisdiction." (Br. p. 11.) All states bordering the ocean have similar laws which have been similarly enforced for years, and no one has yet suggested them to have been inimical to the uniformity and harmony of the maritime law or admiralty procedure. In fact, Rule 21 of Admiralty Rules[29] of this court prescribing the contents of libels does not remotely contemplate jurisdiction in admiralty of such a proceeding. State lien laws based on non-maritime transactions[30] have not injured the uniformity of the maritime law and have consistently been enforced in the state courts in proceedings directly against a vessel.

Petitioners will argue, as they have in the past, that the cases we have cited as recognizing the rule announced in *Smith v. Maryland, supra*, and following its authority (see Footnote 28, p. 29), are not in point; that each of those cases was concerned with either a suit *in personam* or a non-maritime transaction. In their brief they say that in so far as the *Smith* case gave sanction to a proceeding for the forfeiture of a boat *in rem* for violation of a state fishing law, it was overruled by *The Moses Taylor* (1866), 71 U. S. 411, and later cases.

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[29]See footnote 24, page 22, *supra*.

[30]*The Winnebago* (1906), 205 U. S. 354, 360, 362, 27 S. Ct. 509; *The Belfast* (1868), 74 U. S. 624, 645; *The Bee* (D. C. Ore. 1914), 216 Fed. 709, 710, 711; *Martin v. West* (1911), 222 U. S. 191, 196, 32 S. Ct. 42; see, also, *Westfall Larson & Co. v. Allman-Hubble Tug Boat Co.* (C. C. A. 9th, 1934), 73 Fed. (2d) 200.

In none of the cases relied upon as overruling the Smith case is it so much as mentioned. Though not at all controlling, it would seem under ordinary circumstances that, if this Court intended to overrule as broad a principle as that announced in the *Smith* case, it would have at least mentioned it in subsequent decisions; also, that the editors of standard legal publications would have recognized the alleged conflict in principle. In no case decided by this Court is it so much as intimated that the holding in the *Smith* case has been altered or departed from. Instead, that case has been followed consistently on one point or another in thirty-one Federal cases, thirteen of which are decisions of this Court.[21] Neither Benedict in his Standard

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[21] *Twitchell v. The Commonwealth* (1868), 74 U. S. 321, 327; *Edwards v. Elliott* (1874), 88 U. S. 532, 557; *United States v. Cruikshank* (1875), 92 U. S. 542, 552; *McCready v. Virginia* (1876), 94 U. S. 391, 394; *The Ann* (D. C. Md. 1881), 8 Fed. 923, 926; *Spies v. Illinois* (1887), 123 U. S. 131, 166, 8 S. Ct. 22; *Kansas v. Bradley* (C. C. Kan. 1885), 26 Fed. 289, 290; *Dize v. Lloyd* (C. C. Md. 1888), 36 Fed. 651, 652; *Manchester v. Massachusetts* (1891), 139 U. S. 240, 260, 11 S. Ct. 559; *Hardin v. Jordan* (1891), 140 U. S. 371, 382, 11 S. Ct. 808; *In re Boggs* (C. C. Ky. 1891), 45 Fed. 475; *The Elexena* (D. C. Va. 1892), 53 Fed. 359, 366; *Shively v. Bowlby* (1893), 152 U. S. 1, 24, 14 S. Ct. 548; *Lawton v. Steele* (1894), 152 U. S. 133, 138, 14 S. Ct. 499; *The City of Norwalk* (D. C. N. Y. 1893), 55 Fed. 98, 106; *Pacific Gas Imp. Co. v. Ellert* (C. C. Cal. 1894), 64 Fed. 421, 436; *Leverich v. Mayor of Mobile* (C. C. Ala. 1867), 110 Fed. 170, 173; *Lee v. State of New Jersey* (1907), 207 U. S. 67, 70, 28 S. Ct. 22; *The Abby Dodge* (1911), 223 U. S. 166, 174, 32 S. Ct. 310; *Lee Master v. Spencer* (C. C. Colo. 1913), 203 Fed. 210, 217; *United States v. Mackey* (D. C. Okla. 1913), 214 Fed. 137, 145; *United States v. Shallver* (D. C. Ark. 1914), 214 Fed. 154, 157; *United States v. McCullagh* (D. C. Kan. 1915), 221 Fed. 288, 292; *United States v. Samples* (D. C. Mo. 1919), 258 Fed. 479, 481; *United States v. 8 Packages etc. of Drugs* (D. C. Ohio 1910), 5 Fed. (2d) 971, 976; *Stewart v. Rivera* (1927), 274 U. S. 614, 619; *Ocean Industries Inc. v. Greene* (D. C. Cal. 1926), 15 Fed. (2d) 862, 863; *Wampler v. Lecompte* (1930), 282 U. S. 172, 174, 51 S. Ct. 92; *Strechfus v. Mayor* (D. C. Miss. 1935), 10 Fed. Supp. 529, 531; *Cunningham v. Shiriotes* (C. C. Fla. 1939), 101 Fed. (2d) 635, 636; *Mirkovich v. Milnor* (D. C. Cal. 1940), 34 Fed. Supp. 409, 413

Treatise on Admiralty nor the editors of American Jurisprudence, Corpus Juris, or L. R. A. have intimated that *The Moses Taylor* and cases following were decided in conflict with or on the same principle as that decided in the *Smith* case.[22]

The Bessie Mac (D. C. Wash. 1937), 21 Fed. Supp. 220, is cited as a recent case in point. If that case be considered as authority contrary to our position, then it is the only one in existence, and upon the principles announced in this brief and the authorities cited is not only unsound but erroneously decided. It does not mention *Smith v. Maryland*, but, be that as it may, we do not believe the case to be adverse to our position. In that case the owners

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[22]In Benedict on Admiralty, both 5th and 6th editions, the author does not intimate, among the many examples given of inoperative State legislation invading the admiralty jurisdiction, that *Smith v. Maryland* has been overruled. (Benedict on Admiralty, Vol. 1, 6th Ed., section 34.) In Volume 22, American Jurisprudence "Fish and Fisheries", section 55 on the subject of forfeitures and seizures, it is stated at page 708: "It is clear that the state has the power to punish a violation of its fishing laws by the forfeiture of the apparatus used in the illegal fishing. The controversial question is whether the state can summarily forfeit and take or destroy the fishing appliances without giving the owner an opportunity to be heard." In 26 Corpus Juris "Fish", section 64 on the subject of searches and seizures, it is stated (p. 639): "Under some statutes nets, seines, and other appliances used in violation of the laws regulating and protecting fish and fishing rights, and also the fish which are unlawfully taken or possessed, may by proper proceeding be searched for, seized and destroyed. . . . A vessel used or employed in violation of the fish or oyster laws may, under some statutes, be seized and searched, and after proper proceedings be declared forfeited and destroyed or sold, although the owner is not implicated in the offense, and the vessel is so employed without his knowledge or consent; . . ." In Volume 1916F L. R. A. under the annotation entitled "Property Used in Violation of Game Laws" at page 916 it is stated: "The validity of statutes providing for forfeiture of boats or vessels for violation of the fish or shell fish laws has been often sustained." (Citing many cases, including *Smith v. Maryland, supra.*)

of the vessel in question had used it in connection with illegal fishing within the state. They were arrested by state officers and the vessel was seized, not within the jurisdiction of the state but on the high seas. The vessel was held by the Director of Fisheries from date of seizure, August 31, 1937, to October 13, 1937, on which latter date a so-called "petition" *in rem* was filed in the Superior Court of Washington in and for Clallam County, against the boat, net, etc., praying for confiscation and forfeiture thereof under the local state fishing laws. In the meantime, however, a libel was filed in the United States District Court by the owners of the vessel, alleging that it was a Canadian vessel within the navigable waters of the United States, that the owners were unlawfully deprived of possession of the vessel, etc., and her seine net, that the Department of Fisheries of the state was holding the vessel and net without warrant or process and refused to deliver them over,—in other words, that a maritime tort had been committed. The "petition" *in rem* filed in the state court alleged that the state court had admiralty jurisdiction (p. 222). There could be, of course, no basis for such a contention, and the court therefore dismissed it with the following statement:

> "The lien, or right of forfeiture claimed, is not founded on any rule of maritime law, but is dependent upon a right, if any, granted by state or federal statute or United States Constitution."

From that statement it is clear that the court was aware that the right of forfeiture existing under the state law for violation of the state fishing law was not founded on any rule of maritime law, was not a maritime claim or cause, but was secured to the state under the United

States Constitution as part of its police power. Then the court stated, on page 222:

> "The state court is impotent in this case from any viewpoint; it clearly appearing that it proceeds in form and substance against a res, upon the high sea, and it also proceeds against a res, not within the jurisdiction of the state court of Clallam County, since the res, a watercraft, is upon navigable waters; and also within the jurisdiction of the superior court of King county in the state."

We believe that the foregoing statement of the court was predicated upon the fact that the state officers had no authority to seize the boat upon the high seas; that when they seized it the possession of the true owner did not change, and that such seizure constituted a maritime tort and that the title to the vessel might be vindicated in a court of admiralty. It also appeared in the case that the state officials had seized and were about to proceed against the boat and net simply upon the basis of the owner's conviction for violation of the state fishing law. The court held that due process of law required a proceeding against the net itself. In other words, a maritime tort had been committed by the state officials of Washington, and the court said on page 223:

> ". . . Where possession of movable property has been changed, against the right of the true owner, by a maritime tort, . . . the owner may vindicate his title in a court of admiralty by a proceeding in rem. This is given acquiescence by Benedict (5th Ed.), p. 102. The charges in the libel, which upon the motion must be taken as true, clearly show wrongful taking of the vessel."

Petitioners refer (Br. p. 28) to cases directly or indirectly involving forfeitures "wherein *The Moses Taylor*

rule has been overlooked." Cases upholding State fishing laws authorizing seizure and forfeiture of nets and vessels used in violation thereof are then referred to. To avoid the effect of decisions adverse to their principal contention, their argument is therefore; 1. That though *The Moses Taylor*, *The Hine v. Trevor*, and *The Glide, supra*, do not mention *Smith v. Maryland*, they impliedly overrule it; 2. That the editors of all the standard legal works have overlooked the fact that *Smith v. Maryland* was impliedly overruled; 3. That the authors of Benedict on Admiralty have overlooked that fact; and 4. That the various state courts and Federal courts upholding such legislation have overlooked that fact down to and including the decision of *Mirkovich v. Milnor* (D. C. Cal. 1940), 34 Fed. Supp. 409.

Such an argument casts doubt upon the entire position assumed by petitioners. One is naturally lead to inquire whether it might not be that *Smith v. Maryland* and *The Moses Taylor* were decided on principles entirely foreign to one another. We believe that an analysis of the principles involved in those two cases leads to the plain conclusion that they rest upon wholly different bases.

B. The Principles Announced in The Moses Taylor Etc. Are Not in Conflict With Smith vs. Maryland.

Petitioners contend that in addition to *The Moses Taylor*, the decisions in *The Hine v. Trevor* (1866), 71 U. S. 555; and *The Glide* (1896), 167 U. S. 606; 17 S. Ct. 930, impliedly overrule *Smith v. Maryland* insofar as the latter permits a state to proceed under a law of the state for the protection of its fisheries against a vessel or part thereof for forfeiture in a state court after seizure on

navigable waters of the state for violation of the state law.

Petitioners say that this court has observed (Br. p. 26) "that the exclusive character of the admiralty jurisdiction *in rem* was never brought to the attention of the court until the term of 1866, although prior to that time several of the states had, by statute, created various rights *in rem* in things maritime, and provided for their enforcement by suits *in rem* in state courts." *The Glide, supra,* and *Knapp, Stout & Co. v. McCaffrey* (1899), 177 U. S. 638, 20 S. Ct. 824, are then cited.

The Moses Taylor did decide for the first time that *maritime* rights could not be enforced by a proceeding *in rem* in the state courts, even though such rights existed only because conferred by local statute. As we shall presently show, the basis of the holding in the *Smith* case was and could not have been other than that the states control their own fisheries; that a cause of action arising upon violation of laws enacted thereunder give rise to a *non-maritime* cause of action which is not enforceable in admiralty.

Prior to the decision in *The Moses Taylor,* there had been an expanding state jurisprudence which asserted full admiralty jurisdiction.[33] In fact the early California cases had sustained the validity of state laws permitting suits *in rem* against the vessel for the enforcement of maritime liens.[34] Such an assumption of jurisdiction was definitely overthrown by *The Moses Taylor.*

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[33]See "Uniformity in the Maritime Law of the United States," University of Pennsylvania Law Review, 72 Am. Law. Reg. 231.

[34]*Averill v. The Hartford* (1852), 2 Cal. 308; *Meiggs v. Scannell* (1857), 7 Cal. 405; *Taylor v. The Columbia* (1855), 5 Cal. 268. See *Olsen v. Birch & Co.* (1901), 133 Cal. 479, 65 Pac. 1032.

The exclusive character of admiralty jurisdiction in the United States as applied to the enforcement of state laws permitting suits *in rem* in state courts *for the enforcement of maritime liens* was never called to the attention of this court until the year 1866.

Therein lies the point of difference in the cases. The cause of action, however, which arises upon violation of Section 845 of the California Fish and Game Code is *non-maritime* under the authority of *Smith v. Maryland*. The cause of action involved in *The Moses Taylor* was *maritime*. Admiralty has no jurisdiction to enforce non-maritime rights,[85] and the mere fact that the proceeding is for the forfeiture of the net as a penalty and in the nature of a proceeding *in rem* does not alone give jurisdiction to admiralty. State laws giving rise to non-maritime causes of action are enforceable *only in the state courts*.[86] In view of petitioners' claim, however, that the cause is maritime because the proceeding is *in rem*, we shall develop further our contention that the cause of action arising upon violation of the state law here is non-maritime, and so the remedy afforded is not of admiralty cognizance.

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[85] *Yone Suzuki v. Central Argentine Ry.* (C. C. A. N. Y. 1928), 27 Fed. (2d) 795, certiiorari denied 278 U. S. 652, 49 S. Ct. 178; *The Kearney* (C. C. A. N. J. 1926), 14 Fed. (2d) 949; *The St. David* (D. C. Wash. 1913), 209 Fed. 985.

[86] *Knapp, Stout & Co. v. McCaffrey* (1899), 177 U. S. 638, 642, 643, 647, 20 S. Ct. 824; *The Winnebago* (1906), 205 U. S. 354, 360, 362, 27 S. Ct. 509; *The Belfast* (1868), 74 U. S. 624, 645; *The Bee* (D. C. Ore. 1914), 216 Fed. 709, 710, 711; *Martin v. West* (1911), 222 U. S. 191, 196, 32 S. Ct. 42. See, also, *Westfall Larson & Co. v. Allman-Hubble Tug Boat Co.* (C. C. A. 9th, 1934), 73 Fed. (2d) 200.

B-1. The Grant of Admiralty and Maritime Jurisdiction.

Article III, Section 2, Clause 1 of the Federal Constitution provides in part that:

> "The judicial power shall extend . . . to all cases of admiralty and maritime jurisdiction. . . ."

Pursuant to that grant the Congress of the United States in 1789 adopted what has since been enacted into Section 256 of the Judicial Code (28 U. S. C. A., sec. 371), and which, so far as material here, provides that:

> "The jurisdiction vested in the courts of the United States in the cases and proceeding hereinafter mentioned, shall be exclusive of the courts of the several states:
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> ". . .
>
> ". . .
>
> "Third. Of all civil causes of admiralty and maritime jurisdiction, saving to suitors in all cases the right of a common-law remedy where the common law is competent to give it. . . ."

It now becomes necessary to inquire as to the stuff of which admiralty jurisdiction and maritime law in this country consists in order to determine whether in its substantive and remedial aspects the state law here is a part of it.

B-2. THE ADMIRALTY. ITS JURISDICTION AND THE MARITIME LAW OF THE UNITED STATES IS ONLY THAT ACCEPTED AND RECEIVED IN THIS COUNTRY AS INTERPRETED BY JUDICIAL DECISION AND INCLUDED BY ACTS OF CONGRESS.

One of the most concise statements defining the terms "admiralty" and "maritime" which we have found is contained in an article entitled "Tradition and Common Sense in Admiralty" (1929), 14 Marquette Law Review 16, 19-20, where the author states as follows:

> "The true meaning of the constitutional grant of power may be approached conveniently by analyzing the two terms 'admiralty and maritime.' We cannot, of course, assume, as is apparently done quite frequently, that the two words are mere synonyms . . . 'Admiralty', if standing by itself, would indicate reasonably, that the draftsman intended that the United States courts should exercise such jurisdiction as the British Court of Admiralty possessed and none other. . . . If the makers of the constitution had meant to give only this sort of jurisdiction to the courts, they would presumably have stopped after this word; but they added the word 'maritime'. This is, obviously, a term of much wider significance. It denotes the international law of the sea. . . . This body of law deals with all things that pertain to the sea or the ships. It was, in principle, adopted at a very early day by every civilized seafaring nation in the world, with such modification as they might deem appropriate under their specific

conditions. The British Admiralty Law was such a local modification. Adding this broader term to the term 'admiralty' could have but one purpose, that of guarding against that narrow construction which has so often been attempted in this country. It might be asked, however, why if the Federal courts are to have jurisdiction of all cases arising under the international sea-law of the world, the Constitution adds the word 'admiralty'. The answer is obvious. The international maritime law lays down rules regarding rights and duties arising from the sea and navigation. It says nothing as to how these shall be adjudged. Admiralty laws means the way in which the English are in the habit of administering so much of the sea law as they administer in that particular court. To add it to the constitution is merely to say that our Federal courts will follow in their practice the rules of the English admiralty courts, as was done by the Vice Admirals exercising jurisdiction in the Colonies, subject to such change as Congress may from time to time enact. Admiralty law was the existing law of the Thirteen Colonies, and consequently of the new independent states, until it was changed by constitution or statute.

"This construction of the constitutional clause is substantially that for which Justice Story contended in his elaborate and learned treatise of the problem in DeLovio v. Boit, 2 Gall. 452, Federal Cases No. 3776.

"It is also implied in many of the leading cases of the Supreme Court of the United States.

"Waring v. Clarke, 5 How. 441; N. J. Steam Navigation Co. v. Bank, 6 How. 387; The Vengence, 3 Dall. 297; The Betsey, 4 Cranch 443; New Eng-

land Insurance Co. v. Dunham, 11 Wall. 1; The Genessee Chief, 12 How. 44; Jackson v. The Magnolia, 20 How. 296."

The English admiralty has exercised jurisdiction over many non-maritime cases. The jurisdiction of our own admiralty to that extent at least was precluded by the grant. "The limits of the jurisdiction are to be ascertained by a reasonable and just construction of the constitution, taken in connection with the whole instrument, and the purposes for which admiralty and maritime jurisdiction was granted to the Federal government." (Vol. I, Benedict on Admiralty, 6th Ed., p. 7; see, also, *The Lottawanna* (1874), 88 U. S. 558, 576.) "The constitution did not undertake to define the precise limits of that body of law or to lay down a criterion for drawing the boundary between maritime law and local law. Boundaries were to be determined in the exercise of the judicial power in recognition of the purpose of the grant." (*The Thomas Barlum* (1934), 293 U. S. 21, 43, 55 S. Ct. 31, 38.)

In the leading case of *The Lottawanna, supra*, the court pointed out (p. 572) that the maritime law "is only so far operative as law in any country as it is adopted by the laws and usages of that country." And further on the same page the court said:

> "But the actual maritime law can hardly be said to have a fixed and definite form as to all the subjects which may be embraced within its scope. Whilst it is true that the great mass of maritime law is the same in all commercial countries, yet, in each country, peculiarities exist either as to some of the rules, or in the mode of enforcing them. Especially is this the case on the outside boundaries of the law, where

it comes in contact with, or shades off into the local or municipal law of the particular country and affects only its own merchants or people in their relations to each other. Whereas, in matters affecting the stranger or foreigner, the commonly received law of the whole commercial world is more assiduously observed —as, in justice, it should be. No one doubts that every nation may adopt its own maritime code. France may adopt one; England another; the United States a third; still, the convenience of the commercial world, bound together, as it is, by mutual relations of trade and intercourse, demands that, in all essential things wherein those relations bring them in contact, there should be a uniform law founded on natural reasop and justice."

And on page 573 the court continued:

"This account of the maritime law, if correct, plainly shows that in particular matters, especially such as approach a merely municipal character, the received maritime law may differ in different countries without affecting the general integrity of the system as a harmonious whole. The government of one country may be willing to give to its citizens, who supply a ship with provisions at her home port where the owner himself resides, a lien on the ship; whils' that of another country may take a contrary view as to the expediency of such a rule. The difference between them in a matter that concerns only their own citizens, in each case, cannot seriously affect the harmony and consistency of the common maritime law which each adopts and observes."

Then on page 574 the court further said:

"That we have a maritime law of our own, operative throughout the United States, cannot be doubted. The general system of maritime law which was fami-

fair to the lawyers and statesmen of the country when the constitution was adopted, was most certainly intended and referred to when it was declared in that instrument that the judicial power of the United States shall extend 'to all cases of admiralty and maritime jurisdiction.' But by what criterion are we to ascertain the precise limits of the law thus adopted? The constitution does not define it. It does not declare whether it was intended to embrace the entire maritime law as expounded in the treatises, or only the limited and restricted system which was received in England, or lastly, such modification of both of these as was accepted and recognized as law in this country. Nor does the constitution attempt to draw the boundary line between maritime law and local law; nor does it lay down any criterion for ascertaining that boundary."

And on page 575 the court continued:

"One thing, however, is unquestionable; the constitution must have referred to a system of law coextensive with, and operating uniformly in, the whole country."

And on page 576 the court continued:

"Guided by these sound principles, this court has felt itself at liberty to recognize the admiralty jurisdiction as extending to localities and subjects which, by the jealousy of the common law, were prohibited to it in England, but which fairly belonged to it on every ground of reason when applied to the peculiar circumstances of this country, with its extended territories, its inland seas, and its navigable rivers, especially as the narrow restrictions of the English law had never prevailed on this side of the Atlantic, even in colonial times.

"The question as to the true limits of maritime law and admiralty jurisdiction is undoubtedly, as Chief Justice Taney intimates, exclusively a judicial question, and no state law or act of Congress can make it broader, or (it may be added) narrower, than the judicial power may determine those limits to be. But what the law is within those limits, assuming the general maritime law to be the basis of the system, depends on what has been received as law in the maritime usages of this country, and on such legislation as may have been competent to effect it.

"To ascertain, therefore, what the maritime law of this country is, it is not enough to read the French, German, Italian, and other foreign works on the subject, or the codes which they have framed; but we must have regard to our own legal history, constitution, legislation, usages, and adjudications as well. The decisions of this court illustrative of these sources, and giving construction to the laws and constitution are especially to be considered; and when these fail us, we must resort to the principles by which they have been governed."

With regard to changes that might be made in the maritime law the court said on page 576:

"But we must always remember that the court cannot make the law, it can only declare it. If, within its proper scope, any change is desired in its rules, other than those of procedure, it must be made by the legislative department. It cannot be supposed that the framers of the constitution contemplated that the law should forever remain unalterable. Congress undoubtedly has authority under the commercial power, if no other, to introduce such changes as are likely to be needed."

In *The Western Maid* (1922), 257 U. S. 419, 432, 42 S. Ct. 159, 160, the court said:

> "In deciding this question we must realize that however ancient may be the traditions of maritime law, however divers the sources from which it has been drawn, it derives its whole and only power in this country from its having been accepted and adopted by the United States. There is no mystic over-law to which even the United States must bow. When a case is said to be governed by foreign law or by general maritime law that is only a short way of saying that for this purpose the sovereign power takes up a rule suggested from without and makes it part of its own rules."

And, finally, in *Alaska Packers Association v. Marshall* (C. C. Cal. 1938), 95 Fed. (2d) 279, 282, the court said:

> "Admiralty law is not conceived as a sacrosanct scientific sovereign nor is non-conformance at any place in navigable waters lese majeste."

The maritime law of this country and the jurisdiction of admiralty in this country is, therefore, such of the general maritime law and such of admiralty jurisdiction as has been accepted and received by this country by force of judicial decision, the acts of Congress and such alterations, additions or amendments thereto as have been made by acts of Congress.[37] (*The Lottawanna, supra,* and *The Thomas Barlum, supra.*)

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[37] See, also, *Southern Pacific Co. v. Jensen* (1916), 244 U. S. 205, 215, 37 S. Ct. 523, 529. On page 216 of the U. S. Reports the court stated that it "would be difficult, if not impossible, to define with exactness just how far the general maritime law may be changed, modified, or affected by state legislation. That this may be done to some extent cannot be denied."

The next step in our analysis leads us to the question whether control and regulation of fishing on navigable waters within the borders of the state has ever been, by judicial decision, interpreted to have been received and accepted as part of our maritime law, or whether it has been made so by acts of Congress.

B-3. CONTROL OF STATE FISHERIES IN BOTH SUBSTANTIVE AND REMEDIAL ASPECTS HAS NEVER BEEN ACCEPTED OR RECEIVED AS WITHIN THE JURISDICTION OF ADMIRALTY OR AS PART OF OUR MARITIME LAW.

Regardless of what control may have been exercised by the English admiralty over the fisheries of that country, or how firmly imbedded in the general maritime law such control may have been, it is certain that this feature of the general maritime law, if it existed at all, has never been accepted and received by the United States in so far as the territorial waters of the States are concerned. Congress has made no effort to enlarge the scope of the maritime law so as to include it, and only Congress can change the maritime law originally adopted. (*The Lottawanna, supra.*) Whether Congress could do so is beside the point.[38] Not having been originally accepted as part of our maritime law and never having been by act of Congress included therein, such control and regulation is purely non-maritime, as that term is used in considering

[38]In *Missouri v. Holland* (1920), 252 U. S. 416, 40 S. Ct. 382, the validity of the Act of 1918 giving effect to the Migratory Bird Treaty of 1916 was upheld under the treaty making power. Prior to the treaty, an act of Congress attempting to regulate the killing of migratory birds within the borders of the states was held unconstitutional in the District Court. (*United States v. Shauver* (1914), 214 Fed. 154; *United States v. McCullagh* (1915), 221 Fed. 288.)

the grant, and is therefore not within the jurisdiction of admiralty to enforce. It is also significant that Congress has never attempted to include within the jurisdiction of admiralty or *any* Federal court control over the State fisheries.

That such control and regulation has always been considered as purely local to the state cannot be seriously questioned at this late date.[39] Therefore, the control of fisheries within the borders of the state, from the standpoint of substantive law, has never been a part of our maritime law and is clearly of non-maritime concern.

The foregoing proves beyond doubt the cause here in its substantive aspect to be non-maritime and in the remedial to be beyond the jurisdiction of admiralty. Petitioners say, however, that admitting it to be non-maritime in the substantive sense, admiralty has jurisdiction simply because the statute contemplates a proceeding against the net after seizure on navigable waters; that such a proceeding is *in rem* and enforceable only in admiralty. What we have said on the subject should be sufficient, but we shall examine it further in the light of petitioners' contention.

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[39] *Miller v. McLaughlin* (1930), 281 U. S. 261, 50 S. Ct. 296; *Thomson v. Dana* (D. C. Ore. 1931), 52 Fed. (2d) 759, 762, affirmed 52 S. Ct. 409; *Bayside Fish Flour Co. v. Gentry* (1936), 297 U. S. 422, 426, 56 S. Ct. 513, 515; *Manchester v. Massachusetts* (1891), 139 U. S. 240, 260, 11 S. Ct. 559, 563; *McCready v. Virginia* (1876), 94 U. S. 391, 394; *Smith v. Maryland* (1855), 59 U. S. 71; *The Elexena* (D. C. Va. 1892), 52 Fed. 359, 362; *The Abby Dodge* (1911), 223 U. S. 166, 32 S. Ct. 310; *Lawton v. Steele* (1894), 152 U. S. 133, 139, 14 S. Ct. 499, 501; *Mirkovich v. Milnor* (D. C. Cal. 1940), 34 Fed. Supp. 409, 413; *Corfield v. Coryell* (C. C. Pa. 1823), Fed. Cases No. 3230, p. 552.

B-4. If the Right of Substantive Control Is Non-Maritime There Is No Jurisdiction in Admiralty to Apply the Remedy.

No authority has come to our attention holding that the enforcement of a non-maritime cause is of admiralty cognizance under any circumstances. Any number of cases hold that if the cause of action is non-maritime admiralty has no jurisdiction. If jurisdiction depends upon the character of the cause and if the cause, as here, is non-maritime, how can there be jurisdiction any more than in the enforcement of any other non-maritime cause? The mere fact that the remedy is by a proceeding in the nature of one *in rem* certainly is not determinative.

Petitioners repeatedly refer to the net in this case as "the offending thing" and reiterate that the proceeding against it for forfeiture as a penalty partakes of a conventional proceeding *in rem* in admiralty. True, in one respect the net is "the offending thing", but the proceeding to forfeit it is not of the character of the ordinary action *in rem* in admiralty. The true proceeding *in rem* in admiralty has its foundation in the maritime lien whereby the vessel is theoretically hypothecated for the benefit of those who serve her the moment work begins, and likewise hypothecated for torts of a maritime nature committed by or on her. (*The J. E. Rumbell* (1892), 148 U. S. 1, 9.) No such lien exists here against the net or the vessel by the maritime law or otherwise. This feature is more fully dealt with under Point 1, *supra*.

Then it is said by petitioners (Br. p. 14) that because the seizure took place on navigable waters there exists "the conjunction of a maritime *res* and a maritime *situs* of the seizure, which makes the cause of action a cause of ad-

miralty cognizance." That argument begs the question, for it overlooks entirely the genesis of the right to seize. We shall presently show that if the seizure is for violation of federal law authorizing seizure and forfeiture, then jurisdiction is now and always has been of admiralty cognizance by virtue of the constitutional grant of jurisdiction.

In support of their claim that the place of seizure controls the question of jurisdiction; that the fact of seizure creates a "cause of seizure," petitioners cite *Rose v. Himely* (1808), 8 U. S. 240, 4 Cranch; that "every violent dispossession of property on the ocean is, *prima facie*, a maritime tort; as such, it belongs to the admiralty jurisdiction." *The L'Invincible* (1816), 14 U. S. 238, 257, 1 Wheat., is cited in support of the latter claim. Both of those cases were prize cases which have always been part of the maritime law, or at least within the admiralty jurisdiction accepted in this country. Such cases are decided according to the law of nations, and arise now only by capture made by national vessels and a proceeding *in rem* commenced in the name of the United States by the United States District Attorney. (4 Benedict on Admiralty, 6th Edition, p. 318 *et seq.*)

It is said that violations of revenue laws arise out of non-maritime transactions but that the place of seizure nevertheless controls the jurisdiction, citing *La Vengeance* (1796), 3 U. S. 297, 3 Dall.; *The Sally* (1805), 6 U. S. 405, 2 Cranch; *The Betsey and Charlotte* (1808), 8 U. S. 442, 4 Cranch; and *The Sarah* (1823), 21 U. S. 390, 8 Wheat.

None of those cases have a bearing on any question involved here. They were all concerned with violations of Federal law, jurisdiction of which in cases of seizure

on navigable waters was given by the Judiciary Act of 1789 exclusively to courts of admiralty.[40]

In *The Eagle* (1868), 75 U. S. 15, 26, this Court held with reference to the portion italicized in the footnote, that it was included by force of the general grant of admiralty jurisdiction; that "the general jurisdiction in admiralty exists without regard to it"; and that it was therefore "useless and of no effect."

Upon the revision of the statute in 1872, the italicized portion was therefore omitted. (Vol. 6, Benedict on Admiralty, 6th ed., p. 328, section 14; Revised Statutes, Sec. 711.)

The place of seizure does control so far as violation of laws of the United States penalizing such violation by forfeiture of the vessel, but we are unaware of any authority, and petitioners have cited none, holding that for violation of a *state fishing law*, over which admiralty has no jurisdiction, the fact of seizure alone on navigable waters of the state vests admiralty with jurisdiction.

It is not the fact and *situs* of seizure that controls, but whether the seizure is made pursuant to process issued for enforcement of a maritime right or redress of a

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[40]Section 9 of the Judiciary Act of 1789 (1 Statutes at Large, p. 76), provided in part:

"That the district court shall have, . . . exclusive jurisdiction of all civil causes of admiralty and maritime jurisdiction, *including all seizures under laws of impost, navigation or trade of the United States, where the seizures are made on waters which are navigable from the sea by vessels of ten or more burthen, within their respective districts as well as upon the high seas;* saving to suitors in all cases, the right of a common law remedy, where the common law is competent to give it; and shall also have exclusive original cognizance of all seizures on land, or other waters than as aforesaid, made, and of all suits for penalties and forfeitures incurred under the laws of the United States." (Italics ours.)

maritime wrong or because of violation of *Federal* law authorizing seizure and forfeiture.

There should be no doubt that the right of state control over its fisheries is non-maritime. The seizure and subsequent proceeding *in rem* to enforce a forfeiture under such a state law no more confers jurisdiction upon admiralty to enforce than does any other proceeding *in rem* for violation of a non-maritime right.[41]

It is also argued (Br. p. 16) that "the gist of the action in this cause was to try the legality of the act of the state's enforcement officers in seizing the respondent net from the RELIANCE on the navigable waters." On the contrary, as in any forfeiture case, the gist of the action is whether the act permitting forfeiture was committed. Whatever may be the rule under other circumstances, in a non-maritime cause such as this any rule of procedure in admiralty has no application.

Proceedings *in rem*, after seizure on navigable waters for violation of revenue laws, *e.g.*, the Prohibition Act, etc., have always been in admiralty. These are for violation of Federal or national law, and it has always been one of the ancient rights of admiralty to entertain jurisdiction of such proceedings. Such was the ancient admiralty jurisdiction accepted and received in this country,[41a] but nowhere is there to be found authority for the proposition that such a theory of maritime law, as applied to the regulation of state fisheries, has ever been announced

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[41] *Knapp, Stout & McCaffrey Co.* (1899), 177 U. S. 638, 642, 643, 647, 20 S. Ct. 824; *The Winnebago* (1906), 205 U. S. 354, 360, 362, 27 S. Ct. 509; *The Bee* (1914), 216 Fed. 709; *The Belfast* (1868), 74 U. S. 624, 645; *Martin v. West* (1911), 222 U. S. 191, 196, 32 S. Ct. 42.

[41a] *The Eagle* (1868), 75 U. S. 15, 26.

or accepted. Those cases having to do with forfeitures of vessels under Federal law are wholly distinguishable. The ancient jurisdiction of admiralty with regard to violations of Federal law is stated in the leading case of *De Lovio v. Boit* (1815), 2 Gall. 398, 467 (Federal Cases No. 3776), where Mr. Justice Story said that the jurisdiction extended to all "offenses."

Early in our history the cases of *La Vengeance*, etc., paved the way and settled the rule to be that, for violation of Federal law, proceedings *in rem* to forfeit a vessel pursuant to that law, if the seizure were made on navigable waters, was within the jurisdiction of admiralty.

We anticipate that the court may inquire as follows: Conceding that control of state fisheries has never been accepted or received in this country as part of our maritime law or within the jurisdiction of admiralty, does not a proceeding to forfeit a net *in rem* for violation of such a state law fall within the exclusive jurisdiction of admiralty, for the same reasons that enforcement *in rem* of certain state laws creating maritime rights which are not part of our maritime law must nevertheless be enforced in admiralty? The answer must be in the negative upon the basis of the same general principles heretofore stated.

Maritime rights created by state legislation, enforceable *in rem* only in admiralty, were maritime because considered local, "border legislation" and on the "outside boundaries" of the general maritime law "where it comes in contact with, or shades off into the local or municipal law of the particular country and affects only its own merchants or people in their relations to each other." (*The Lottawanna* (1874), 88 U. S. 558, 572.) Such rights were nevertheless maritime because "within a

sphere restricted by the concept of the admiralty and maritime jurisdiction". (See *The Thomas Barlum* (1934), 293 U. S. 21, 44, 55 S. Ct. 31, 38; *The Lottawanna*, 88 U. S. 558, 576.) and therefore a subject or right which Congress could include as part of the maritime law of this country. Because Congress had not so acted, the states were permitted to create them for the reason that in so doing none of the expressed purposes of any Act of Congress were violated; no material prejudice resulted thereby to the general characteristics of the general maritime law in its interstate or international relations. (See *Southern Pacific Co. v. Jensen* (1916), 244 U. S. 205, 216, 37 S. Ct. 523.) The rights so created *had not before existed* by the general maritime law or by the maritime law of this country. However, being so closely allied to the general maritime law—on the "outside boundaries" of it—and subject to inclusion by Act of Congress, those rights could only be enforced *in rem in admiralty*. (See *The J. E. Rumbell* (1892), 148 U. S. 1, 11 *et seq.*, 13 S. Ct. 498; *The Lottawanna*, *supra*.)

In the case of State fisheries the right of control had *always* existed exclusively in the states and when state legislation was enacted in regulation thereof no new right was created. The right had always remained with the states and was not surrendered to the Federal Government by the grant of admiralty and maritime jurisdiction. (*Corfield v. Coryell* (C. C. Pa. 1823), Federal Cases No. 3230.) Thus such control never became part of our maritime law and so far as the constitutional grant is considered never became the subject of Federal control except to the extent of the paramount power to regulate navigation. (*McCready v. Virginia* (1876), 94 U. S. 391.) Not ever having been interpreted by judicial de-

cision to be part of our maritime law it is not and never has been part of it; nor up to the present time subject to inclusion therein by Act of Congress. There lies the principal point of difference between state laws regulating their fisheries and state laws held to be "border legislation", and enforceable *in rem* only in admiralty. State control of its fisheries has been held exclusive in the state and up to the present time not subject of regulation by Congress. (See *U. S. v. Shauver* (D. C. Ark. 1914), 214 Fed. 154; *U. S. v. McCullagh* (D. C. Kan. 1915), 221 Fed. 288. See, also, *Missouri v. Holland* (1920), 252 U. S. 416, 40 S. Ct. 382.) It necessarily follows then that up to now such control creates a *non-maritime* right in the state of which admiralty has no jurisdiction for enforcement.

We do not mean to say that such control could never be exercised by Congress and thereby be included as part of our maritime law, only that up to now has not been. Conditions may arise, unforeseen now by anyone, whereby such control becomes necessary to preserve the harmony and uniformity of the maritime law. But those conditions have yet not presented themselves. Congress has so considered, as witness the fact that it has made no attempt in that direction, and only Congress could (other things being equal) so include it now, for it was excluded at the start of our government from our concept of maritime law or admiralty jurisdiction. (See *The Lottawanna*, *supra*, at page 576.)

No decision has ever been rendered with which we are familiar holding or intimating that admiralty has jurisdiction of proceedings *in rem* to forfeit a vessel after seizure on navigable waters of the State for violation of

a non-maritime right in the State created by valid State law. In fact in *Knapp, Stout & Co. v. McCaffery* (1899), 177 U. S. 638, 642, 20 S. Ct. 824, 826, this court said:

"The rule to be deduced from these cases, so far as they are pertinent to the one under consideration, is this: that wherever any lien is given by a state statute for a cause of action cognizable in admiralty, either *in rem* or *in personam*, proceedings *in rem* to enforce such lien are within the exclusive jurisdiction of the admiralty courts.

"But the converse of this proposition is equally true, that if a lien upon a vessel be created for a claim over which a court of admiralty has no jurisdiction in any form, such lien may be enforced in the courts of the state. Thus, as the admiralty jurisdiction does not extend to a contract for building a vessel, or to work done or materials furnished in its construction, The Jefferson, (*People's Ferry Co. v. Beers*), 20 How. 393; The Capitol, (*Roach v. Chapman*), 22 How. 129, we held in *Edwards v. Elliott*, 21 Wall. 532, that, in respect to such contracts, it was competent for the states to enact such laws as their legislatures might deem just an expedient, and to provide for their enforcement *in rem*. The same principle was applied in *Johnson v. Chicago & C. Elevator Co.*, 119 U. S. 388, to a statute of Illinois giving a lien upon a vessel for damage done to building abutting on the water, upon the ground that the court had previously held that there was no jurisdiction in admiralty for damage done by a ship to a structure affixed to the land. *The Plymouth*, 3 Wall. 20; *Ex parte Phoenix Ins. Co.*, 118 U. S. 610. There was really another sound reason for the decision in the fact that the suit was *in personam*, with an at-

tachment given upon the property of the defendant, which, as we shall see hereafter, is quite a different case from a proceeding *in rem*.

"To establish the proposition that the proceeding in this case was an invasion of the exclusive jurisdiction of the admiralty courts defendants are bound to show, first, that the contract to tow a raft is a maritime contract; second, that the proceeding taken was a suit *in rem* within the cases above cited, and not within the exception of a common law remedy, which section 563 was never designed to forestall."

On page 647 of the opinion, this Court, in referring to the decision in the case of *Johnson v. Chicago etc. Elevator Co.*, 119 U. S. 388, said, first quoting from the *Johnson* case, and then making an observation of its own:

"• • • 'There being no lien on the tug by the maritime law for the injury on land inflicted in this case, the state could create such a lien therefor as it deemed expedient, and could enact reasonable rules for its enforcement, not amounting to a regulation of commerce.' *It would seem that even if the suit had been in rem against the vessel, it would have been sustained, as the injury was not one for which an action would have lain in admiralty.*" (Italics ours.)

In *Knapp, Stout & Co. v. McCaffrey, supra*, the court stated specifically that the state law gave rise to a non-maritime transaction. Such law could likewise provide for a lien to be enforced *in rem* against the vessel itself and two conditions must exist before a state law may be held to invade the jurisdiction of admiralty: 1. That the cause of action is maritime, and 2. that the proceeding taken is a suit *in rem*.

In *The Winnebago* (1906), 205 U. S. 354, 362, 27 Sup. Ct. 509, a contract to build a vessel—a non-maritime contract—was involved. *After the vessel was launched and while in the water* work on the contract continued. Thereafter she made several voyages until "a claim of lien against the steamer," (p. 356) was filed in the state court for work and materials furnished after launching and prior to enrollment and issuance of a license to engage in trade. The Michigan statute under which the lien was claimed provided that for certain services, etc. (p. 359):

> "Every water craft of above five tons burthen, used or intended to be used, in navigating the waters of this State, shall be subject to a lien thereon."

On page 360 the court said:

> "It is further contended that to seize the vessel and subject her to sale and the proceeds thereof to distribution in the state court would be in direct conflict with the exclusive jurisdiction in admiralty in the courts of the United States in favor of liens of a maritime character, and therefore the Michigan Act is unconstitutional. No maritime lien is asserted in this case, and it is merely a matter of speculation as to whether any such claim existed, or might be thereafter asserted. No holder of any such maritime lien is here contesting the constitutionality of the state law."

It was then pointed out that maritime liens, if any there were, would be superior to the State lien and would be enforceable only in admiralty, which would not in the least be obstructed by the action of the State court and that title under a decree of a court of admiralty would defeat the

title gained in the State court. Then it was said on page 362:

> "It is next objected that the court erred because certain items were allowed for material furnished the vessel after she was launched, and therefore the subject of exclusive jurisdiction for which a lien could only be enforced in the admiralty. But we agree with the state court that these items were really furnished for the completion of the vessel and were fairly a part of her original construction. In such a case the remedy was within the jurisdiction of the state court."

And on the same page:

> "But it must be remembered that concerning contracts not maritime in their nature, the State has authority to make laws and enforce liens, and it is no valid objection that the enforcement of such laws may prevent or obstruct the prosecution of a voyage of an interstate character."

In *The Belfast* (1868), 74 U. S. 624, after repeating the rule that State courts do not have authority to hear and determine a suit *in rem* in admiralty to enforce a maritime lien, the court said on page 645:

> "Such a lien does not arise in a contract for materials and supplies furnished to a vessel in her home port, and in respect to such contracts it is competent for the states, under the decisions of this court, to create such liens as their legislatures may deem just and expedient, not amounting to a regulation of commerce, and to enact reasonable rules and regulations prescribing the mode of their enforcement."

In *Westfall Larson & Co. v. Allman-Hubble Tug Boat Co.* (C. C. A. 9th, 1934), 73 Fed. (2d) 200, a suit was

commenced in the state court "against the Brimanger," a motor ship, to establish a lien thereon pursuant to state statute for damage to a bridge and power cable caused by the vessel. (See opinion of state court in *Grays Harbor Co. v. The Brimanger*, Wash. 1933, 18 Pac. (2d) 25.) Judgment resulted in favor of the plaintiff, City of Aberdeen. At the time of the collision the vessel was being towed by defendants in the present case. The owners of the vessel, who were defendants in the state court proceeding, paid the judgment and then filed a libel in admiralty in the District Court against the defendant in the present action to recover for damage done to the vessel itself. On page 204 the court said:

> "There can be no doubt that the damage inflicted by the Brimanger upon the bridge and the power cables constituted a nonmaritime tort."

The libel was consequently dismissed because, being a non-maritime tort, admiralty was without jurisdiction. The case recognizes the validity of the state law imposing a lien and permitting enforcement of it against the vessel by name in the state court.

In *Martin v. West* (1911), 222 U. S. 191, 32 S. Ct. 42, it appeared that the steamer Norwood, owned and enrolled in San Francisco, collided with a pier of a toll drawbridge near Aberdeen, Washington, on the Chehalis River, a navigable stream flowing into the Pacific Ocean. Damage was done to the pier and the cause was negligence of the master. A suit was brought in the state court against

the owners of the vessel to assert and enforce a lien given by state law. Judgment went for the plaintiff. The state law provided that (p. 196):

> "Sec. 5953. All steamers, vessels, and boats, their tackle, apparel, and furniture, are liable,
>
> " '. . . .
>
> " '6. For injuries committed by them to persons or property within this state, or while transporting such persons or property to or from this state.
>
> " 'Demands for these several causes constitute liens upon all steamers, vessels, and boats, and their tackle, apparel, and furniture, and have priority in their order herein enumerated, and have preference over all other demands; but such liens only continue in force for the period of three years from the time the cause of action accrued.
>
> " 'Sec. 5954. Such liens may be enforced, in all cases of maritime contracts or service, by a suit in admiralty, *in rem*, and the law regulating proceedings in admiralty shall govern in all such suits; and in all cases of contracts or service not maritime, by a civil action in any district court of this territory.' "

This Court ignored the provision of the statute that denominated the action in the state court "a suit in admiralty" and said on page 197:

> "As the bridge was essentially a land structure, maintained and used as an aid to commerce on land, its locality and character were such that the tort was non-maritime, . . . and, consequently, it was ad-

missible to pursue in the state court the remedy provided by the state statute, even though that law gave a lien on the vessel. Johnson v. Chicago & Pac. Elevator Co., *supra;* Knapp, Stout & Co. v. McCaffrey, 177 U. S. 638; The Winnebago, *supra.*"

In *The Bee* (D. C. Ore. 1914), 216 Fed. 709, an action was brought in the state court under a lien law of the state against the steamship Bee to recover damages for personal injury. The case was removed to the Federal Court because of diversity of citizenship. The court said on page 710, *et seq.:*

"The cause of action as made by the complaint is not a maritime tort of which courts of admiralty have jurisdiction. The consummation of the wrong having taken place on land and not on navigable water, and the cause of action not having been consummated on such water, there is therefore no lien on the boat under the maritime law. . . .

"The lien sought to be enforced, if it exists at all, is non-maritime and created by the state statute, and is enforceable according to the statutory method prescribed by the state law and the rules of evidence and procedure applicable thereto. Johnson v. Chicago, etc., Elevator Co., 119 U. S. 388, 7 Sup. Ct. 254, 30 L. Ed. 447. The case is here by reason of diversity of citizenship, and not as a proceeding in admiralty.

"The facts stated in the complaint would bring the case within the provisions of the employers' liability

law if the action was *in personam* against the owner of the vessel, but it is contended by the defendant: (1) that the boat lien law has no application to the case made by the complaint because the injury complained of was not done by the 'boat or vessel' within the meaning of the law; (2) that the Oregon Employers' Liability Act does not apply to actions brought against a boat to enforce a lien given by the state statute; and (3) that the defendant vessel is owned in California, and the law of that state governs the relations between the vessel and her owners on the one hand, and the employees of the ship on the other, and that under such law the mate, whose negligence it is alleged caused the injury, was a fellow servant with the plaintiff, for whose act neither the vessel nor her owner is liable."

On page 711 the court continued:

"(2) The remedy provided by the state law for enforcing the lien given by the statute is an action against the boat or vessel by name, rather than *in personam* against the owner (section 7506, Lord's Ore. Laws), but after the seizure of the vessel and the return of the warrant that proceedings are to be had against the vessel in the same manner as if the action had been commenced against the person on whose account the damages accrued (section 7509). And if an issue of fact be joined the same proceedings shall be had as in other actions. Section 7511. This being so it would seem to follow that the trial should be governed and the liability of the parties

determined by the same rule as if the action were *in personam* against the owner; . . . " .

The foregoing cases clearly establish that if the transaction involved is non-maritime, then admiralty is without jurisdiction in any event, though the state law permits a proceeding against the vessel itself following a seizure upon navigable waters within the territory of the state. The same rule would of course apply in the case of a net, part of the vessel's equipment.

The distinguishing feature of a proceeding *in rem* against a vessel or its equipment is that admiralty acquires jurisdiction to give a valid title as against the world. A proceeding under the state law here is not to pass title or try title as that term is usually employed, rather is it a proceeding to forfeit title and interest for a violation of law which upon judgment of condemnation relates back to the time of commission of the offense[42] and does not purport to and could not foreclose the rights of those having martime claims.[43]

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[42]See, *United States v. Grundy* (1806), 7 U. S. 337, 350, 3 Cranch.

[43]*The Winnebago* (1906), 205 U. S. 354, 360, 362, 27 S. Ct. 509; *The Elexena* (D. C. Va. 1892), 53 Fed. 359.

Conclusion.

We submit that the foregoing authorities and analysis clearly demonstrate that:

1. The remedy of forfeiture provided by the state law here under review is a common law remedy which the common law is competent to give, bringing it squarely within the saving clause of the Judicial Code, for the reasons following:

(a) The common law of California consists of the *lex non scripta* and the Acts of Parliament amendatory thereof existing prior to the American Revolution; and,

(b) The Statute of 12 Car. II, c. 18 (1660), as construed by the common law courts of England, provided a common law remedy by a proceeding *in rem* for the forfeiture of vessels used in violation of that statute.

2. The said remedy is not a "proceeding *in rem* according to the course of admiralty" in that it does not arise out of a maritime lien, nor does a decree rendered pursuant to its exercise "bind all the world."

3. The cause of action invoked upon a violation of the state law here under review is non-maritime, and the remedy of forfeiture is not within the jurisdiction of admiralty to enforce, because:

(a) This Court so held in *Smith v. Maryland*, *supra*, a decision which this court has never overruled in any subsequent case; and,

(b) The body of the maritime law of this nation, as well as its admiralty jurisdiction, is that and that only which has been "accepted and received," as the same is interpreted by judicial decision and added to by Act of Congress.

(c) The control of state fisheries has never been accepted and received as part of this nation's maritime law or as within the jurisdiction of admiralty, and is therefore of non-maritime concern.

(d) Being of non-maritime concern, admiralty is without jurisdiction to enforce it, by a proceeding *in rem* or otherwise.

Respectfully submitted,

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